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Supreme Court of the United States

OCTOBER TERM, 1936

No. 77

HARRIET C. BINNEY, FREDERIC CUNNINGHAM, AND CONSTANCE C. PERTZOFF, ET AL., APPELLANTS,

vs.

HENRY F. LONG, COMMISSIONER OF CORPORATIONS AND TAXATION OF THE COMMONWEALTH OF MASSACHUSETTS

APPEAL FROM THE PROBATE COURT OF THE COUNTY OF NORFOLK, COMMONWEALTH OF MASSACHUSETTS

FILED MAY 28, 1936.

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[fol. 5]

IN PROBATE COURT OF NORFOLK COUNTY

In Equity

HARRIET C. BINNEY et als.

v.

HENRY F. LONG, Commissioner of Corporations and Taxation

PETITION IN EQUITY FOR ABATEMENT OF SUCCESSION—Filed September 20, 1933

To the Honorable the Judge of the Probate Court in and for the County of Norfolk:

Respectfully represent Harriet C. Binney, of Boston, Constance C. Pertzoff, of Brookline, Susannah C. Coolidge, of Milton, all of Massachusetts, and Frederic Cunningham, of New York, Frederic Cunningham and George S. Parker of said Boston, as they are Trustees under Indenture of Trust dated January 26, 1877, and said Frederic Cunningham as he is Administrator of the Estate of Hetty Sullivan Lawrence Cunningham, William Lawrence, John S. Lawrence, Leverett Saltonstall and Augustus Hemenway, as they are Trustees under the Will of Sarah E. Lawrence, late of Brookline, Petitioners, that they bring this Petition against Henry F. Long, in his capacity as Commissioner [fol. 6] of Corporations and Taxation of the Commonweath of Massachusetts, Respondent, and allege him to be the only

party interested in the matter of said Petition, and further represent:

(1) That Hetty Sullivan Lawrence Cunningham died August 20, 1931, intestate, and a resident of Brookline in the County of Norfolk, leaving as her sole heirs-at-law her four children, the Petitioners, and said Frederic Cunningham has been duly appointed and qualified as her Administrator.

(2) By Indenture of January 26, 1877, by and between Hetty Sullivan Lawrence (subsequently Cunningham), Amos A. Lawrence and Francis W. Lawrence, said Hetty conveyed property to said Amos and Francis upon the trusts of said Indenture, a copy of which is hereto attached, made a part hereof and marked "A". Said Indenture in brief provided that the income should be paid to said Hetty during her life, and from and after her death the income should be paid to and among such of her children as should be living at the time of payment, in equal shares. Said Hetty left four children, the individual Petitioners, and [fol. 7] the Respondent determined the Succession and Legacy Tax upon their present interests to amount to $709.63, and in accordance with the provisions of Chapter 65 of the General Laws certified said amount to the Trustees under said Indenture, and said amount with interest amounting to $7.10 was paid by them October 20, 1932.

(3) By agreement dated in 1862, Amos A. Lawrence entered into agreement with the Massachusetts Hospital Life Insurance Company by which he deposited with said Company a sum of money, the income to be paid to Hetty Sullivan Lawrence Cunningham during her life, and after her death to her Executors or Administrators In Trust and for the special use and benefit of such person or persons as the said Hetty may appoint by her last Will and Testament made by her while unmarried, or any instrument in the nature of a last Will and Testament made by her while a married woman—in failure of such appointment then to be distributed by said Administrators among her children, if she should have any, the issue of a deceased child to have the same share their parent would have been entitled to. The Respondent certified to Frederic Cunningham, [fol. 8] Administrator of the Estate of said Hetty Sullivan

Lawrence Cunningham, a tax in full upon the failure to exercise the power of appointment, amounting to $830.65, which sum together with interest amounting to $.55 was paid by him September 21, 1932.

(4) Said Hetty Sullivan Lawrence Cunningham had under the Will of Sarah E. Lawrence, who died May 27, 1891, and which Will was duly proved and allowed by the Probate Court for the County of Norfolk, July 1, 1891, and a copy of which Will is hereto attached, made a part hereof and marked "B", a life interest with a special testamentary power of appointment among her issue, which power she did not exercise, and the property in which she had such an interest passed, therefore, under the terms of the Will of said Sarah E. Lawrence in equal shares to the four children of said Hetty Sullivan Lawrence Cunningham, namely—Harriet C. Binney, Constance C. Pertzoff, Frederic Cunningham and Susannah C. Coolidge, for their respective lives and after their deaths for others. The Respondent certified to the Trustees under the Will of Sarah E. Lawrence taxes upon the life interest of said four children in said property as follows:

[fol. 9] To Harriet C. Binney $714.50
To Constance C. Pertzoff 717.53
To Frederic Cunningham 720.55
To Susannah C. Coolidge 723.58

they being respectively 46, 45, 43 and 41 years of age. Said taxes were paid by the Trustees February 3, 1933. All and each of said taxes are illegal and excessive, and the imposition of them and each of them is in violation of the Constitution of the Commonwealth of Massachusetts and of the Constitution of the United States of America, in that they deprive the Petitioners of their property without due process of law and of the equal protection of the laws.

Wherefore the Petitioners pray that this Court will determine—

(1) that said taxes and each of them are illegal and excessive and should be abated in whole; and

(2) for such other and further orders and directions as to this Court shall seem meet.

By their Attorney, Charles M. Rogerson.

[fol. 10] EXHIBIT "A" TO PETITION

This Indenture of two parts made this twenty-sixth day of January in the year eighteen hundred and seventy-seven by and between Hetty Sullivan Lawrence, of Brookline, in the County of Norfolk and Commonwealth of Massachusetts, Spinster, party of the First Part, and Amos A. Lawrence, Merchant, and Francis W. Lawrence, Gentleman, both of said Brookline, party of the Second Part, Witnesseth, that whereas the said Hetty hath by her deed of even date herewith granted and conveyed to the said Amos and Francis a parcel of land, with the buildings thereon, lying on Monmouth Place in said Brookline (reference being made to the said deed for a particular description of the said land) to hold the same to them, their heirs and assigns, upon certain trusts declared in an Indenture of even date with said deed; Now, therefore, we the several parties hereto, hereby declare that this instrument is the indenture named in the said deed and that the said trusts are the following and no other, to wit: To hold the granted premises, or, at their discretion, to sell the same, or any part, or parts, thereof, and invest the proceeds in such real or personal property as they may deem safe and advantageous, and so again, and whenever they may deem it for the [fol. 11] advantage of the trust property to vary investments and to sell any substituted property at any time held upon these trusts and reinvest the proceeds, making in all cases, suitable deeds and transfers. To collect the rents and income of said trust-property, original and substituted, and after deducting therefrom the expense of taxes, insurance, and repairs, and all other necessary and proper charges and expenses, including a reasonable compensation for their own services, to pay the remaining, or nett, rents and income, by quarter-yearly payments to the said Hetty Sullivan Lawrence, in every year during her natural life, either into her own hand or upon her order or receipt in writing, given at or after the time, to her sole and separate use, free from all marital claim or right, and not by anticipation, or in compliance with any assignment. And from and after the death of the said Hetty, to pay the said nett rents and income, by quarter-yearly payments, to and among such of the children of the said Hetty as may be liv-

ing at the time of payment, in equal shares, and to the lawful issue, then living, of any *her* child then deceased, such issue taking by representation the share which such deceased child would have taken had he or she been living, until the expiration of twenty years next succeeding the death of the said Hetty; and upon the expiration of the [fol. 12] said twenty years, to convey in fee simple and transfer the said trust-property, original and substituted, in equal shares, to and among the children, then living, of the said Hetty, and the lawful issue, then living, if any, her child then deceased, such issue taking, by representation, the share which such child would have taken had he or she been living. If at the death of the said Hetty, or at any time during the said twenty years next thereafter, no child or lawful issue of the said Hetty be living, the trustees shall convey in fee simple and transfer the said trust-property, real, personal, and mixed, whether original or substituted, to the heirs at law of the said Amos A. Lawrence, if he have then deceased, and if he have not then deceased, to the heirs at law of the said Hetty. If either of the Trustees herein named dies, resigns, or from any cause ceases to be a trustee, the surviving, or remaining, trustee shall appoint in writing a new trustee, and make the necessary conveyances and transfers to him; and in case such vacancy is not so filled within thirty days next after it occurs, or in case both the said Amos and Francis cease to be trustees, such appointment of a new trustee shall be made by the Probate Court for said Norfolk. Every power herein given to a Trustee herein named is [fol. 13] given to a substituted trustee, and in the event of a vacancy, the surviving or remaining trustee for the time being shall have every power that the two trustees would have. Each trustee, whether original or substituted, shall be liable only for his own receipts, payments, and wilful defaults, and not one for another; and upon all sales by the Trustees, their receipts shall exempt the purchaser from all concern as to the application of the purchase-money. And the said Amos A. Lawrence and Francis W. Lawrence hereby accept the said trust, and covenant with the said Hetty Sullivan Lawrence faithfully to discharge the same. In Witness Whereof the said parties of the First and Sec-

ond Parts have hereunto set their hands and seals on the day and year first above written.

Hetty S. Lawrence. (Seal.) Amos A. Lawrence. (Seal.) Francis W. Lawrence. (Seal.)

Executed and delivered in presence of Harriett D. Lawrence, Ida H. Whittemore to F. W. L., Lucius M. Sargent H. S. L.

COMMONWEALTH OF MASSACHUSETTS,
Norfolk, ss:

26th March, 1877.

Then personally appeared the above named Hetty Sullivan Lawrence, and acknowledged the foregoing instrument to be her free act and deed;

Before me,

Lucius M. Sargent, Justice of the Peace.

[fol. 14] A true copy of Indenture recorded with Norfolk Co. Deeds Mar. 26, 1877 in Liber 488 Fol. 107.

Attest: J. S. Burdakin, Reg.

[fol. 15] EXHIBIT "B" TO PETITION

I, Sarah E. Lawrence, of Brookline, in the County of Norfolk, widow, make this my last Will, hereby revoking all wills by me at any time heretofore made.

First. I appoint my two sons, Amory Appleton Lawrence and William Lawrence, the executors of my will, and I request that neither of them be required to give any surety on his bond.

Second. I give to those of my children who survive me, in equal shares, all my silver plate, furniture, books, pictures, jewels, watches, clothes, horses, carriages and all other like articles of personal or domestic use or ornament.

Third. All the residue of my property, real and personal, and all the property over which at the time of my death I may have any power of testamentary appointment, I give and appoint to such of the following persons as are living at my death, namely; my said sons, Amory Appleton Lawrence and William Lawrence, and my sons-in-law, Peter C.

Brooks, William Caleb Loring, Frederick Cunningham and Augustus Hemenway, to hold the same to them, their heirs and assigns, upon the following trusts:

In the first place to set apart out of said residue of my property, but not out of the property over which I may have a power of appointment, real or personal property, or both, of the value of seven hundred and fifty thousand dollars, my trustees making the selection and valuation thereof according to their best judgment, and to hold the said property so set apart, and all property which may be substituted therefor, and to accumulate and add to the capital the net income thereof for the period ending with the death of the longest liver of my children living at the date of this Will, subject to the following provisions, that is to say:

If at my death any of my grandchildren other than my [fol. 16] grandchild Alice Amory, the daughter of my deceased daughter Marianne Appleton Amory, are living and have attained the age of twenty-one years, to set apart property, real or personal, or both, valued by my trustees at Fifty thousand dollars, for each of such grandchildren and to pay to him or her the net income thereof, quarter-yearly in every year during his or her life and upon his or her death to convey in fee, transfer and pay over the last named trust property, original and substituted, to or for the benefit of such persons, in such manner and on such terms, as he or she shall appoint by will, and in default of appointment, to those persons who shall then be his or her heirs by blood, according to the then law of Massachusetts; and whenever during the period aforesaid any one of my grandchildren, who was in being at my death, but who had not then attained the age of twenty-one years, shall attain that age, to set apart property, real or personal, or both, valued by my trustees at Fifty thousand dollars, and to pay to him or her the net income thereof quarter-yearly in every year during his or her life, and upon his or her death to convey in fee, transfer and pay over the last named trust property, original and substituted, to or for the benefit of such persons, in such manner and on such terms as he or she shall appoint by will, and in default of appointment to those persons who shall then be his or her heirs by blood according to the then law of Massachusetts; and whenever during the period aforesaid, any one of my grandchildren who was

not in being at my death, shall attain the age of twenty-one years, to pay to him or her Fifty thousand dollars, or to convey in fee simple and transfer to him or her property, real or personal, or both, valued by my trustees at Fifty thousand dollars. And upon the death of the longest liver of my said children living at the date of this Will, namely: Amory Appleton Lawrence, William Lawrence, Sarah Lawrence Brooks, Susan Mason Loring, Hetty Sullivan Cunningham, and Harriet Dexter Hemenway, to pay to every [fol. 17] one of my grandchildren, then living, who has not then attained the age of twenty-one years, Fifty thousand dollars, or to convey and transfer to him or her property, real or personal, or both, valued by my trustees at Fifty thousand dollars. If the said trust property with its accumulations at the end of said period be not sufficient to provide the said money or property for every one of my grandchildren who is then less than twenty-one years old, then to divide the said accumulated trust property, or so much thereof as remains, equally among such grandchildren.

And if after making such payments of Fifty thousand dollars, or transferring property of that value, at the end of said period to or for the benefit of my grandchildren who have not then reached the age of twenty-one years, there remains a surplus of said trust property, then to divide, distribute and convey such surplus of property in equal shares to and among all my grandchildren (including my said grandchild Alice Amory) then living, and the issue, then living, of every one of my said grandchildren (including my said grandchild Alice Amory) then deceased, such issue of every deceased grandchild taking one share according to the stocks. As I cannot foretell the number of my grandchildren, the provision which I wish to make for all of them may prove inadequate. But my will is that every grandchild who attains the said age before the death of the longest liver of my said children living at the date of this Will, shall, in order of age, receive or have the benefit of, as aforesaid, the full sum of Fifty thousand dollars, or property of that value, so long as the accumulated trust property suffices therefor, although my grandchild, or grandchildren who subsequently attain that age thereby fail to receive any benefit from my intended bounty. The words grandchild and grandchildren shall be taken to mean

the child or children of my children, and not my great-[fol. 18] grandchildren or remoter issue. But if at the death of the survivor of my said children living at the date of this Will, all my issue are extinct, then upon the death of such survivor to convey in fee simple, transfer and pay over so much of the said accumulated trust property as remains undistributed to those who shall then be my heirs by blood according to the then law of Massachusetts.

In the second place, whereas I have excluded my said grandchild, Alice Amory, from the benefits of the fund hereinbefore provided for my grandchildren (except so far as she or her issue may share in any surplus at the final distribution of the fund as is above set forth) for the reason that I have provided or intended to provide for her in my lifetime, and whereas I have hitherto placed for her in trust the sum of Fifteen thousand dollars and am at present intending to place in trust for her Thirty-five thousand dollars more, but for certain reasons have delayed so to do, now, if at my death I shall not have placed in trust for said Alice, or shall not have conveyed to her in her own right said remaining sum of Thirty-five thousand dollars, then, if said Alice or any of her issue are living at my death, I direct my trustees to set apart out of the said residue of my property, but not out of the property over which I may have power of appointment, the sum of Thirty-five thousand dollars, together with interest thereon at the rate of five per cent, from the eighth day of May, 1886, to the day of my death, and to pay the said interest to the said Alice, or, if she be then deceased, leaving issue then living, to such issue according to the stocks, and to hold the said sum of Thirty-five thousand dollars in trust, if said Alice be living at my death, to pay the net income of the said sum and of all substituted property to the said Alice Amory by quarter-yearly payments in every year during her life, and upon her death to convey in fee, transfer and pay over the said [fol. 19] trust property, original and substituted, to or for the benefit of such persons, in such manner and on such terms, as she shall by will appoint, and in default of appointment to those persons who shall then be her heirs by blood according to the then laws of Massachusetts; but if said Alice shall have died before me leaving issue and any of her issue are living at my death, to pay said sum of

Thirty-five thousand dollars to those of said issue who are living at my death according to the stocks.

And in the third place, If my said grandchild, Alice Amory, or any of her issue survive me, to estimate, according to the best judgment of my trustees, in the first place, the value of all the residue aforesaid of my property, after deducting the sums herein directed to be set apart, and also in the second place the value of all the property over which at the time of my death I may have any power of testamentary appointment, and then to set apart property, real or personal, or both, equal in amount to one-fourteenth of the sum of the said two values, my trustees making the selection and valuation thereof according to their best judgment, but said property (though estimated on the sum of the said two values as aforesaid) shall be taken only from my property and not from the property over which I may have a power of appointment, and to pay the net income of said property, so set apart, and of all substituted property, to the said Alice by quarter-yearly payments in every year during her life, and upon her death to convey in fee simple, transfer and pay over the said trust property, original and substituted, to or for the benefit of such of her issue, in such manner and on such terms as she shall by will appoint, and in default of such appointment to her issue then living, such issue taking by the stocks, and in default both of such appointment and of such issue, to those persons who shall [fol. 20] then be my heirs by blood according to the then law of Massachusetts, but if said Alice shall have died before me, then to convey in fee simple, transfer and pay over the said property so set apart, to her issue, according to the stocks. This provision for my said grandchild Alice is intended to give her substantially an equal interest with my other grandchildren, according to my best judgment at present, although I am well aware that owing to the impossibility of foreseeing the future, she may in the end enjoy less or more than they.

And in the fourth place. As to what remains of the property given and appointed to my trustees as aforesaid, after setting apart the funds and trust-properties above provided, to pay the net income thereof, and of all substituted property, quarter-yearly to such of my six children living at the date of this Will as shall be living at the time of payment, in equal shares, and to the issue then living, of every

one of my said six children then deceased, (such issue of every deceased child taking one share according to the stocks) in every year, until the death of the longest liver of my said six children, and from and after the death of such longest liver, during the twenty years next ensuing upon such death, to pay the said net income quarter-yearly to my grandchildren, living at the time of payment, excluding my said grandchild Alice Amory, making the division per capita and not according to the stocks, the issue then living of every one of my grandchildren then deceased (excluding my said grandchild Alice Amory) taking (according to the stocks and not per capita) the share which such my deceased grandchild would have taken, if living. And upon the expiration of the said twenty years, to convey in fee simple, transfer and pay over the said trust property, and all substituted property, to the children of my said six children, they taking per capita and not according to the stocks, the issue then living of every such grandchild of [fol. 21] mine who has then deceased, taking according to the stocks and not per capita the share which such deceased grandchild would have taken if living.

Provided however, that any one of my said six children may by his or her will, appoint the shares in which that part of the net income which is hereinbefore given to his or her children, living at the time of payment, and to the issue then living, of any such child then deceased, shall be apportioned among such children and issue, during the time between his or her death and the time fixed for the distribution of the trust property; and also the proportions in which that part of the trust property and fund which is hereinbefore given, in such final distribution, to his or her children, then living, and the issue then living of his or her children then deceased shall be divided among such children and issue, but this proviso respecting income is subject always to the discretionary power hereinafter given to my trustees. If at the death of the last survivor of my said six children, or at any time during the twenty years next ensuing upon his or her death, no issue of any of my said six children are living, then upon the death of the longest liver of such six children and their issue to convey in fee simple, transfer and pay over the said trust fund and property to those persons who shall then be my heirs by blood, according to the then law of Massachusetts. It is provided al-

ways as to every one of the trusts hereby declared, and during the continuance of the same that if, for the reason that any child or descendant of mine is insolvent or (in the opinion of my trustees) is reckless, extravagant, or of bad morals, or if for any other reason which is satisfactory to my trustees, my trustees deem that the interest of such child or descendant, will be promoted by withholding the share of net income to which such child or descendant is entitled, then they may withhold the same, or any part [fol. 22] thereof, and in that event they shall apply the same at their discretion to the maintenance and support of the wife and children of such my son or male descendant, or of the husband and children of such my daughter or female descendant, or of one or more of them to the exclusion of the others, in such proportions as my trustees shall deem best, or to the education of the children of such my child or descendant, or of any one or more of such children to the exclusion of the others, or they may accumulate the said share of net income and add the same to the trust fund and property, or they may apply a part of the said share of net income to one or more of these purposes; and this they may do as often and so long as they deem it expedient, exercising their best judgment and discretion.

Fourth. I empower my trustees to retain any property in the same state of investment in which they may receive the same, notwithstanding such investment is a wasting investment or would not be sanctioned by a court of equity, or to sell and convey any of the said trust property, and to reinvest the proceeds of such sales according to their best judgment, and so again and whenever they may deem it expedient, to vary investment, both of original and substituted property, to change real estate into personal estate, and personal estate into real estate, making sales by public auction or private contract, without the aid of any court.

All payments to married women shall be to their sole and separate use, without any power of anticipation on their part, and free from the control of any husband. If any stock, bonds or other securities are retained or bought by my trustees at a premium above the par value, or are wasting securities, the trustees may, should they see fit so to do, regard the whole of the interest or dividends received on [fol. 23] such securities as income, and generally, what expenses, commissions and charges should be charged to in-

come and what to capital, and what sums or property received shall be deemed capital and what income, shall be determined by my trustees, the opinion of whom, or of a majority of whom, made in good faith shall be conclusive. The words "my trustees' in this Will shall be taken to mean the trustees for the time being, whether original or substituted. If any person herein named as trustee fails to become a trustee, or if any one of my trustees ceases by death, resignation, removal or otherwise to be a trustee, the remaining trustees, or a majority of them, may in writing oppoint a successor or successors to fill such vacancy, and the number of trustees shall not be permanently reduced below three. But if such vacancy or vacancies be not filled, as aforesaid, so that the number of trustees is reduced below three, then at the expiration of six months next after the same may occur the same shall be filled and a new trustee or trustees be appointed by the Court having jurisdiction for that purpose. But notwithstanding any vacancy or vacancies exist the surviving or remaining trustees shall have all the powers and authorities herein given to all my trustees. A majority of my trustees, for the time being, shall have power to act in all cases of making or changing investments, and to act as to all payments, receipts, dividends and partitions under this Will, and as to all sales, conveyances and transfers of real or personal property. No bond shall be required of any trustee herein appointed, or of any other or future trustee, unless the Court having jurisdiction *of my Will, upon the petition of* some person interested, and upon cause shown, deems it necessary that such a bond shall be given. Every one of my trustees shall be severally, and not jointly, liable for his own receipts, payments and wilful defaults, and not for [fol. 24] those of any other trustee, unless done or suffered with his express assent, and no trustee shall be liable save for his own wilful default, nor shall he be liable for allowing the trust securities and moneys to be in the custody, possession or control of one or more of his co-trustees. Upon all sales by my trustees the purchasers shall not be concerned to see to the application of the purchase money. In making any distribution of any trust fund and any division and conveyance of any trust property, I authorize my trustees to appraise and set apart in such manner as they may deem just and to convey in fee simple and trans-

fer to the persons entitled to a share or portion thereof, so much of the said trust property, real and personal, or either, as my trustees may deem equal in value to such share or portion or if they deem it expedient, they are authorized to sell by public or private sale, without the aid of any Court, and to convey and transfer sufficient of the said trust property to enable them to pay in money what they shall deem to be the just value of such share or portion, and they may pay the same accordingly; or they may make such distribution, partly in the proceedings of such sales, and partly in other property, real or personal. If any person herein named as an executor or trustee refuses such trust, his right to any devise, legacy or advantage under this Will shall not be thereby affected or impaired.

The words "child," "children," "issue" and "heirs," in this my Will shall be taken to mean, child, children, issue and heirs by blood, and not by adoption, and no person claiming by, under or through an adoption, shall in any event be considered as of kin to me.

In witness whereof I, the above named Sarah E. Lawrence have hereunto set my hand and seal, this thirtieth day of December in the year One thousand eight hundred and eighty-six.

Sarah E. Lawrence. (Seal.)

[fol. 25] Signed, sealed, published and declared by the said Sarah E. Lawrence, as her last Will, in the presence of us, who at her request, in her presence, and in the presence of each other have hereto set our names as witnesses.

Edwd. S. Grew. Arthur T. Kidder. Arthur Onthank.

[fol. 25½] I, Sarah E. Lawrence of Brookline in the County of Norfolk, widow, make this Codicil to my last Will, which will is dated December 30, 1886.

First. To my sons, if they survive me, or if only one survives me then to such one I give the sum of One hundred thousand dollars. I shall be pleased, if my sons or son see fit, to have them or him make out of said sum any payments which I may by any memorandum request, and to pay any balance to my residuary legatees upon the trusts in my said will created. But I expressly declare that I do not hereby intend to create any trust, and I declare that no person or corporation shall have any claim legal or

equitable or by way of resulting trust or otherwise against my said sons or son in whose discretion it shall rest to make or not to make any or all such payments.

Second. Whereas, by my said will, I have directed as to the residue of my estate that in the first place property of the value of Seven hundred and fifty thousand dollars shall be set apart to be held subject to certain provisions for the benefit of my grandchildren, and whereas my granddaughter Alice Amory was excluded from the benefit of said property except as to a certain possible surplus, now therefore I exclude also from the benefit of said property my grandchildren Lawrence Brooks and Eleanor Brooks, children of my daughter Sarah Lawrence Brooks in the same manner and only in the same manner, that is, with the same exceptions for them and their respective issue, as the said Alice Amory is now excluded.

Third. Whereas by my said will I have directed as to the residue of my estate in the second place that certain provisions shall be made for the said Alice Amory, I now hereby revoke those directions as to the said residue which are indicated by my said will as being in the second place and substitute therefor as follows: "In the second place whereas I have excluded my said grandchildren Alice Amory, Lawrence Brooks and Eleanor Brooks from the benefit of the fund hereinbefore provided for my grandchildren, except so far as they or their issue may share in any surplus at the final distribution of the fund as is above [fol. 26] set forth, for the reason that I have provided or intend to provide for them in my lifetime, and whereas I have hitherto given or placed in trust for each of them the sum of Fifteen thousand dollars, and am at present intending to place in trust for or give to each of them the further sum of Thirty-five thousand dollars, but for certain reasons have delayed so to do; now if at my death I shall not have placed in trust for or given to all of said three grandchildren said remaining sums of Thirty-five thousand dollars, then as to any one of said three grandchildren for or to whom said sum of Thirty-five thousand dollars has not been placed in trust or given by me, if such grandchild or his or her issue is or are living at my death, I direct my trustees to set apart out of the said residue of my property, but not out of the property over which I may have

a power of appointment, for such grandchild the sum of Thirty-five thousand dollars, together with interest thereon at the rate of four per cent from the time when such grandchild became of age to the day of my death, to pay the said interest to such grandchild, or if he or she be then dead leaving issue then living, to such issue according to the stocks and to hold the said sum of Thirty-five thousand dollars in trust if such grandchild be living at my death to pay the net income of the said sum and of all substituted property to such grandchild by quarter-yearly payments in every year during his or her life, and upon his or her death to convey in fee transfer and pay over the said trust property original and substituted to or for the benefit of such persons, in such manner and on such terms as he or she shall by will appoint and in default of appointment to those persons who shall then be his or her heirs by blood, according to the then laws of Massachusetts, but if such grandchild shall have died before me leaving issue and any of his or her issue are living at my death to pay said sum of Thirty-five thousand dollars to those of said issue who are living at my death according to the stocks."

Fourth. In all other respects, I confirm my said will.

[fol. 27] In witness whereof I, the said Sarah E. Lawrence have hereunto set my hand and seal, this 31st. day of March in the year one thousand eight hundred and ninety.

Sarah E. Lawrence. (Seal.)

Signed, sealed, published and declared by the above named Sarah E. Lawrence, as and for a Codicil to her last Will in the presence of us, who at her request, in her presence and in the presence of each other have hereto set our names as witnesses.

Susan C. Lawrence. Catherine M. Hichborn. Harriet L. Hichborn.

[Endorsed:] 28,100. Lawrence, Sarah E. Will. Filed June 9, 1891. Ret. 1 W. July 1891. Allowed July 1, 1891. 167/60.

[fol. 28] Citation, in usual form, showing service on Respondent, omitted in printing.

Appearance of counsel for respondent, filed Dec. 11, 1933, omitted in printing.

[File endorsement omitted.]

[fol. 29] In Probate Court of Norfolk County

In Equity

[Title omitted]

Agreed Statement of Facts—December 17, 1934

The parties hereto stipulate and agree that, for the purposes of this case only, the following facts are true and are all the facts material to the case.

(1) Hetty Sullivan Lawrence Cunningham, late of Brookline, Norfolk County, died August 20, 1931, intestate, leaving as her sole heirs-at-law four children, namely the petitioners, Harriet C. Binney, Constance C. Pertzoff, Susannah C. Coolidge and Frederic Cunningham. Said Frederic Cunningham is the duly appointed and qualified administrator of her estate. The net amount of her estate was $299,241.58 upon which was paid a tax as follows: 1% on $100,000, 2% on $100,000, and 4% on $99,241.58.

(2) Said Hetty by indenture dated January 26, 1877, a copy of which is annexed to the petition marked "A" which copy is a true copy of the indenture, conveyed certain property to Amos A. Lawrence and Francis W. Lawrence as trustees to whom the petitioners Frederic Cunningham and George S. Parker are successor trustees upon the trusts set forth therein.

(3) After the death of said Hetty the respondent deter-
[fol. 30] mined the value of the several life interests passing under said indenture to her children as follows: Harriet C. Binney $4,366.92; Constance C. Pertzoff $4,403.31; Frederic Cunningham $4,457.90; and Susannah C. Coolidge $4,512.48. On each of the interests the respondent exacted

a succession tax of 4%, totalling $709.63, which amount together with interest of $7.10 was paid by the trustees to the Commonwealth on October 20, 1932. Since the interest passing to each child under this indenture is less than $10,000 it is not subject to any tax imposed by General Laws, Chapter 65 unless grouped with another or other interests which with this one aggregate $10,000 or more.

(4) In 1862 Amos A. Lawrence deposited with the Massachusetts Hospital Life Insurance Company $7,947.33 under a contract, a copy of which is hereto annexed marked "C" which copy is a true copy of said contract.

In accordance with the provisions thereof income was accumulated during the minority of Hetty until December 31, 1875 when the increased principal amounted to $18,016.45 and was accumulated thereafter until December 31, 1877 when the increased principal amounted to $20,046.58.

(5) After the death of said Hetty the respondent determined the value of the interests passing to her said children under said contract because of her failure to exercise the power of appointment of the said fund held by the Massachusetts Hospital Life Insurance Company at a total of $20,766.20. On this last mentioned sum the Commissioner exacted a succession tax of $830.65 or 4% which amount together with interest of $.55 was paid by her administrator to the Commonwealth on September 21, 1932.

The value of the interest passing to each child under this contract is one-fourth of $20,766.20 or $5,191.55. Since this [fol. 31] sum is less than $10,000 it is not subject to any tax imposed by General Laws, Chapter 65 unless grouped with another or other interests which with this one aggregate $10,000 or more.

(6) The Will of Sarah E. Lawrence who died May 27, 1891 was proved and allowed by the Probate Court for Norfolk County on July 1, 1891, a copy of which Will is annexed to the petition marked "B" which copy is a true copy of said Will. The petitioners William Lawrence, John S. Lawrence, Leverett Saltonstall and Augustus Hemenway are trustees under the said Will of Sarah E. Lawrence.

(7) Said Hetty Sullivan Lawrence Cunningham did not exercise the special testamentary power of appointment

given her by said Will of Sarah E. Lawrence. After the death of said Hetty the respondent determined the value of the several life interests passing to her children by said Will in default of appointment as follows: Harriet C. Binney $17,862.46; Constance C. Pertzoff $17,938.15; Frederic Cunningham $18,013.80; and Susannah C. Coolidge $18,089.53.

On each of these interests the respondent certified to the Trustees under the Will of Sarah E. Lawrence and exacted a succession tax of 4%, totaling $2,876.16, which amount, together with interest of $65.67, was paid by the Trustees to the Commonwealth on February 3, 1933. Since the interest passing to each child under this will is in excess of $10,000 but less than $25,000 the rate of tax to which it is subject under General Laws, Chapter 65 is 1% unless such interest is grouped with another or other interests which together aggregate $25,000 in which case the higher rates apply.

Charles M. Rogerson, Attorney for Plaintiffs. John L. Hurley, Asst. Atty. Gen. for Respondent.

[fols. 32-34] Exhibit "A" to agreed statement of facts omitted. Printed side page 10, ante.

[fol. 35] Exhibit "C" to Agreed Statement of Facts

Annuity in Trust

The Massachusetts Hospital Life Insurance Company, in consideration of the Principal Sum of Seven thousand nine hundred and forty seven dollars and thirty three cents, received by them of Amos A. Lawrence of Boston in the State of Massachusetts in trust as hereafter mentioned, the receipt whereof is hereby acknowledged. Do hereby promise and agree to and with the said Amos, his executors and administrators, that the said Company shall and will invest the same in Bank or other Stock, or in Real Estate, or place the same out at interest on mortgage or other security at the discretion of the Directors; and that the said Company shall and will yearly and every year during the

natural life of Hetty Sullivan Lawrence of Boston in the State of Masschusetts (daughter of said Amos) pay, or cause to be paid to the said Hetty in yearly payments on the first days of January, in each and every year, during the natural life of the said Hetty (unless added to the principal Sum as provided below) (upon her separate order and receipt, to be dated on, or subsequent to, the several days on which the said several payments shall fall due; for her separate use, free from the debts, control, or interference of any husband she now has, or may hereafter have; which Annuity and Principal Sum are both hereby declared to be inalienable by the respective grantees thereof,) the first payment to be made on the first day of January next, the same rate of interest on said Principal Sum as the said Company shall actually make and receive upon their Capital Stock paid in, and the other property in their possession, including Real Estate, Stocks of the United States, Bank or other Stock, Notes, Bonds, and Mortgages, after deducting all necessary expenses and charges (excepting Office rent and the salaries of the Com- [fol. 36] pany's officers and servants) and all actual losses by bad debts or otherwise, not arising from the actual fault of the Company or their servants, and also half of one per centum per annum for the expenses of their Office, and the labor, trouble and responsibility of investing, taking care of, and managing said Trust Property. The said Principal Sum received of said Amos to be invested and managed, and the amount of the income thereof to be estimated, ascertained and determined by the Directors of said Company, in the way and manner provided in the extract from the article on Annuities in Trust, printed at the bottom.

Interest to commence November 24, 1862.

And the said Company, for the consideration aforesaid, further promise and agree to and with the said Amos, his executors and administrators, that, in sixty days after proof of the decease of the said Hetty they will assign, transfer, and pay the amount of the aforesaid Principal Sum, (or such part thereof as shall not have been lost by bad debts or otherwise, without the actual fault of said Company or their servants) and all interest then due thereon at the time of her death, in Real Estate, Stocks, Notes, Bonds and Mortgages belonging to said Company,

all, any, or either of them, at the pleasure and discretion of the Directors, at the prices at which the same respectively shall stand charged in the Books of the Company at the decease of said Hetty, in the way and manner provided in said Extract from said Article, to her Executors or Administrators in trust, and for the special use and benefit of such person or persons as the said Hetty may appoint by her last will and testament made by her while [fol. 37] unmarried, or by any instrument in the nature of a last will and testament made by her while a married woman. In failure of such appointment then to be distributed by said Administrators among her children, if she should leave any, (the issue of a deceased child to have the same share their parent would have been entitled to.)

In failure of such apppintment and of issue then to be distributed by said Administrators according to law.

It is agreed that the said Hetty when of age, and during her minority her Father or Guardian, shall have liberty to have one or more of said annual payments added to said principal Sum (in order to increase said principal Sum) giving the Company notice of their intention at least sixty days before the annual time of paying said interest.

The receipt of said Executors or Administrators to be a full discharge to said Company, which shall not in any event, be responsible for the application of said money by said Executors or Administrators.

In Witness Whereof, the said Massachusetts Hospital Life Insurance Company have, by their Actuary and Secretary duly empowered for this purpose, signed and delivered this Contract, this twenty fourth day of July one thousand eight hundred and sixty two.

(S.) Moses L. Hale, Secretary. (S.) Charles J. Loring, Actuary.

[fol. 38] In Probate Court of Norfolk County

[Title omitted]

Amendment to Agreed Statement of Facts—February 19, 1935

The parties to the above entitled action agree that the following facts are true and, if material, may be considered

by the Court in addition to the facts appearing in the Agreed Statement of Facts heretofore filed:

Hetty Sullivan Lawrence Cunningham had five (5) children: Harriet C. Binney who was born June 27, 1885, Constance C. Pertzoff who was born September 8, 1886, Frederic Cunningham who was born December 28, 1888 and Susannah C. Coolidge who was born March 19, 1890. These four (4) children are now living. Lawrence Cunningham was born December 29, 1892 and died in 1923, without issue.

The Plaintiffs, by Charles M. Rogerson, Their Attorney. The Defendant, by Charles F. Lovejoy, Ass't Attorney General.

[Endorsed:] February 20, 1935. Amendment allowed. Joseph R. McCoole, Judge of Probate Court.

[fol. 39] In Probate Court of Norfolk County

[Title omitted]

Reservation

This case came on to be heard before me and at the request of the parties I now reserve and report the said case upon the pleadings and the agreed statement of facts for the determination of the full court.

Joseph R. McCoole, Justice of the Probate Court.

February 20, 1935.

[fol. 40] In Supreme-Judicial Court of Massachusetts

Rescript—January 2, 1936

In The Case of

Harriet C. Binney et als.

vs.

Commissioner of Corporations and Taxation

Pending in the Probate Court for the County of Norfolk

Ordered, that the register of probate and insolvency in said county make the following entry under said case in the docket of said court; viz.,—

Petition denied.

By the Court, Walter F. Frederick, Clerk.

January 2, 1936.

Over

[fols. 41 & 42] Brief Statement of the Grounds and Reasons of the Decision

The reasons of the decision are set forth at length in the opinion, filed with the reporter of decisions, to which reference is made.

[fol. 42a] IN SUPREME JUDICIAL COURT OF MASSACHUSETTS

HARRIET C. BINNEY & Others

vs.

COMMISSIONER OF CORPORATIONS AND TAXATION

NORFOLK:

Argued May 15, 1935

Present: Rugg, C. J., Pierce, Donahue, Lummus, & Qua, JJ.

Tax, On legacies and successions. Devise and Legacy, Time of vesting, Remainder, Power. Trust, Construction of instrument creating trust, Time of vesting, Remainder, Power. Constitutional Law, Equal protection of the law

Reservation and report by McCoole, J., of a petition in the Probate Court for the county of Norfolk for the abatement of certain taxes.

OPINION—Filed January 7, 1936

RUGG, C. J.:

This is a petition brought in the Probate Court for the abatement of certain inheritance taxes assessed with respect to the estate of Hetty S. L. Cunningham, late of Brookline in this Commonwealth. G. L. (Ter. Ed.) c. 65, § 27. The case has been reserved without decision for our determination upon the pleadings and an agreed statement of facts. Mrs. Cunningham died intestate in August, 1931, leaving as her sole heirs at law four children born in 1885, 1886, 1888 and 1890, who are the petitioners. The net amount of her own estate was $299,241.58. No question arises concerning the inheritance tax on that estate. At her death, each of her children also took interests in property held under three different trusts. All these interests have by the respondent been united with the interest in the estate of the intestate for the purpose of determining the tax. The petitioners contend that these interests under the [fol. 42b] several trusts cannot be so united. If that contention be sound, two of them are not taxable because not

sufficient in amount, and the third must be taxed at a lower rate. The petitioners further contend that, apart from any question of uniting the interests, two of these trust interests are not of a nature taxable under the statute. The three trusts are as follows:

(1) In 1877, the intestate created a trust. Its pertinent terms were these: She reserved to herself only a life estate of the net income but no power to revoke, alter, or amend. From and after her death, for twenty years, the net income was payable by quarter-yearly payments in equal shares "to and among such of" her children as "may be living at the time of payment," living issue of a deceased child to take by right of representation. At the expiration of the twenty years after the death of the intestate, the trustees were to make division of the principal of the trust equally among her children then living, the issue of any deceased to take by right of representation with the provision that, if at her death or at any time during the twenty years next thereafter no child or issue of the intestate should be living, the trustees should transfer the principal of the trust to the heirs at law of her father if he then were deceased; otherwise, to her own heirs at law. No one of the interests passing to the petitioners under this trust was large enough to be taxable by itself; such interest was taxable only by uniting it with other interests.

(2) In 1862, Amos A. Lawrence, the father of the intestate, created a trust for her benefit, which was accumulated until 1877, and thereafter the income was paid to her during her life. At her death, the principal and unpaid income were to be distributed to such persons as she might by will appoint and, in default of appointment, to her surviving children. No one of these shares, thus passing directly to each of the four children of the intestate on her death in default of appointment, was large enough to be taxed by itself; such share is not taxable unless united.

(3) Each of the four children of the intestate succeeded on her death to an interest in a trust established under [fol. 42c] the will of her mother, Sarah E. Lawrence, who died in 1891. Property was thereby left to pay the income to each of her six children, two of whom are now living, and to the issue per stirpes of any such child deceased, so long as any of the six children should live; and for twenty years

after the death of the last survivor, the income was to be paid to the grandchildren and to their issue per stirpes. The will then provided that each child by will might "appoint the shares in which" the income given to his or her children and issue "shall be apportioned among such children and issue," and might also appoint the proportions in which the principal given to such children and issue "shall be divided among such children and issue." The intestate did not exercise the special testamentary power of appointment given her under the will of her mother. The value of each of the several life interests passing to each of her children in default of such appointment is approximately $18,000. No one of these interests by itself is subject to a tax in excess of one per cent, but by uniting it with other interests the rate would be four per cent.

Briefly stated, the contentions of the petitioners are (1) that the interests received under the three trusts are not of a nature taxable under G. L. (Ter. Ed.) c. 65, and (2) that the interests under the 1862 trust and the interests under the will of Sarah E. Lawrence cannot be united with each other or with other interests to determine the rate of the tax.

The governing statutory provisions are these: By G. L. (Ter. Ed.) c. 65, § 1, property as therein described "which shall pass by will, or by laws regulating intestate succession, or by deed, grant or gift, except in cases of a bona fide purchase for full consideration in money or money's worth, made in contemplation of the death of the grantor or donor or made or intended to take effect in possession or enjoyment after his death * * * shall be subject to a tax at the percentage rates fixed by the following table. * * *" In this table progressive percentages are fixed increasing with the value of the property or interest passing. The last paragraph of said § 1 is in these words: "All prop- [fol. 42d] erty and interests therein which shall pass from a decedent to the same beneficiary by any one or more of the methods hereinbefore specified and all beneficial interests which shall accrue in the manner hereinbefore provided to such beneficiary on account of the death of such decedent shall be united and treated as a single interest for the purpose of determining the tax hereunder." G. L. (Ter. Ed.) c. 65, § 2, reads as follows: "Whenever any person shall exercise a power of appointment, derived from any disposi-

tion of property made prior to September first, nineteen hundred and seven, such appointment when made shall be deemed a disposition of property by the person exercising such power, taxable under section one, in the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power, and had been bequeathed or devised by the donee by will; and whenever any person possessing such a power of appointment so derived shall omit or fail to exercise the same within the time provided therefor, in whole or in part, a disposition of property taxable under section one shall be deemed to take place to the extent of such omission or failure in the same manner as though the persons thereby becoming entitled to the possession or enjoyment of the property to which such power related had succeeded thereto by a will of the donee of the power failing to exercise such power, taking effect at the time of such omission or failure."

The petitioners contend that their interests arising under the trust established by the intestate in 1877 are not taxable. That contention is based on the facts that the trust was created in 1877 without power to alter or revoke, with life interest in the intestate, and that the youngest of her children was born in 1890, before the passage of any statute imposing an inheritance tax. It is urged that the gift was completed before any tax was permissible. The petitioners invoke Coolidge v. Long, 282 U. S. 582, as decisive in their favor. In that case, by the terms of the deed and declaration of trust the income was to be paid to the settlors during their joint lives and then the entire income to [fol. 42e] the survivor, and upon the death of the survivor the principal was to be divided equally among their five named sons; provided that, if any of the sons should predecease the survivor of the settlors, his share should go to those entitled to take his intestate estate under the statute of distributions in force at the date of the death of such survivor. All the sons were living when the trust was established and were named in the trust instrument. That decision rests upon the ground that the remainder vested in the sons of the settlors at the time when the trust instrument was executed and delivered, which was prior to the enactment of the statute imposing the tax. The circumstance that each son was liable to be divested of his interest in the remainder by his own death before that of the sur-

vivor of the settlors was said not to "render the succession incomplete. The vesting of actual possession and enjoyment depended upon an event which must inevitably happen by the efflux of time, and nothing but his failure to survive the settlors could prevent it." Coolidge v. Long, 282 U. S. 582, at page 598. It was held that to impose a tax in these conditions was an impairment of the obligation of the contract of the trust instrument contrary to art. 1, § 10, of the Constitution of the United States, and also a violation of the due process clause of the Fourteenth Amendment.

The case at bar seems to us distinguishable from Coolidge v. Long. By the instant trust instrument the income was to be paid to the intestate during her life, and after her death the net income was to be paid by quarter-yearly payments to such of her children "as may be living at the time of payment, in equal shares," with provision for payment to issue of any deceased child, "until the expiration of twenty years next succeeding the death of" the intestate; "and upon the expiration of the said twenty years" to transfer in absolute ownership the corpus of the trust "in equal shares to and among the children, then living" of the intestate. It is open to doubt whether this gift over could take effect as a remainder and whether its true nature is not an executory limitation. 1 Fearne on Contingent Remainders (10th ed.) 397, 398. Simonds v. Simonds, 199 [fol. 42f] Mass. 552. It is not necessary to discuss this point. It appears clear that at most the remainder was contingent and not vested until the death of the intestate. None of her children was born at the time the trust was established. Nothing then vested in them. The children of the intestate up to the moment of her death had no interest in the trust except, at best, "a bare contingent remainder expectant upon her death and their surviving her." Wright v. Blakeslee, 101 U. S. 174, 177. There are many decisions to the effect that trust instruments of a tenor similar to the one here in issue constitute contingent remainders, and until the event or date designated for the vesting arrives the persons to take cannot be ascertained and no estate vests in any one before the happening of that event. Olney v. Hull, 21 Pick. 311, 315. Nash v. Nash, 12 Allen, 345, 347. Thomson v. Ludington, 104 Mass. 193. Springfield Safe Deposit & Trust Co. v. Ireland, 268 Mass.

62, 66. Gray on Perpetuities (3d ed.) 86, and cases cited. The case at bar is governed by these decisions. The interest in this trust did not vest in the petitioners until the death of their mother in 1931. That was subsequent to the enactment of the tax law. Whatever interest then vested in them was subject to the tax.

The trust created by Amos A. Lawrence in 1862 gave the intestate a life estate with full power of testamentary appointment and, in failure of such appointment, directed distribution of the corpus of the fund among her children. The succession of the interest of the petitioners in this trust was dependent entirely upon the failure of the intestate to exercise the power of appointment. The intestate was in control of the succession to the interest in this trust so long as she lived, notwithstanding the fact that if no appointment should be made her children would take. The right to enter into enjoyment and possession of this particular trust interest was vested in no one until her death in 1931. It awaited her death and her exercise of, or failure to exercise, the power of appointment before it could descend and vest. Minot v. Treasurer & Receiver General, 207 Mass. 588, 592-593. Saltonstall v. Treasurer & Receiver [fol. 42g] General, 256 Mass. 519, 523-524. Manning v. Board of Tax Commissioners, 46 R. I. 400, 411. The succession, therefore, took effect upon the death of the intestate in 1931. The tax law had been enacted long before that date. The succession was subject to the tax. This point is covered by the decision in Saltonstall v. Saltonstall, 276 U. S. 260, 270, 271, 272. We are unable to perceive anything inconsistent with this conclusion in Coolidge v. Long, 282 U. S. 582, or in Helvering v. Grinnell, 294 U. S. 153.

The interests accruing to the petitioners as children of the intestate under the will of Sarah E. Lawrence did not vest upon the death of the latter in 1891. Under the terms of that will already stated, the net income of that trust was to be paid in equal shares to her six children during their lives and to the issue of any deceased child. After the death of the last survivor of her children and for twenty years thereafter, shares in the net income were to be paid quarter-yearly to her grandchildren living at the time of payment. This gift of income to the children of the intestate was contingent in a double aspect. In order to take,

such child must survive the intestate and also be living at the time of payment. So, also, as to sharing in the principal; grandchildren who decease before the time set for the termination of the trust are excluded and, until that time arrives, the persons to be benefited cannot be ascertained. Apart from these contingencies, the interests of the children of the intestate did not vest upon the death of Sarah E. Lawrence in 1891, because the intestate was given power of appointment of the shares of income among her children. Until her death, the right to this interest vested in no one. Minot v. Treasurer & Receiver General, 207 Mass. 588, 592-593. Saltonstall v. Saltonstall, 276 U. S. 260, 269-270. The same principal applies as has been stated with respect to the Amos A. Lawrence trust.

The contention that the failure of the intestate to exercise the special testamentary power of appointment given to her by the will of Sarah E. Lawrence does not afford basis for a tax cannot be supported. The argument is that the intestate was given a special non-exclusive power of [fol. 42h] appointment which must be exercised, if at all, in favor of her children or issue of a deceased child, that she was not at liberty to exclude any of her children or issue of a deceased child from a share, and that she must give to each a substantial share and could not give a merely nominal or illusory amount. That argument cannot prevail in this Commonwealth. The case at bar on this point is governed by Burnham v. Treasurer & Receiver General, 212 Mass. 165. The failure of the intestate to exercise the power of appointment is indicative of approval of equal division. There appears to be no reason to overrule this controlling authority. It has not been shaken or weakened by any subsequent decisions. We are unable to perceive that it is incompatible with any provision of the Constitution of the United States.

There was no error in uniting the several interests passing to the petitioners on the death of the intestate for the purpose of determining the tax under the last paragraph of G. L. (Ter. Ed.) c. 65, § 1, already quoted. Manifestly the interests passing under the 1877 trust established by the intestate were properly united with those passing from her by intestate succession. Marble v. Treasurer & Receiver General, 245 Mass. 504. Pratt v. Dean, 246 Mass. 300.

The interests established by the Amos A. Lawrence trust of 1862 and those created by the will of Sarah E. Lawrence may likewise be so united. It is expressly provided by G. L. (Ter. Ed.) c. 65, § 2, that, whenever property passes by omission or failure of the donee of a power to exercise a power of appointment, "a disposition of property taxable under section one shall be deemed to take place * * * as though the persons thereby becoming entitled * * * had succeeded thereto by a will of the donee of the power * * *" Those words are thus imported into § 1 of said c. 65 and the property is taxable according to its terms. It follows that these interests by virtue of these sections are taxable as property of the intestate passing upon her death. See Ames v. Commissioner of Corporations & Taxation, 269 Mass. 352.

The provisions of G. L. (Ter. Ed.) c. 65, § 2, are not violative of the constitutional guaranty of equal protection of [fol. 42i] the laws. They apply only to the exercise of powers of appointment derived from any disposition of property made prior to September 1, 1907. This constitutional guaranty does not prevent reasonable classification nor condemn differences resulting from such classification. Tax laws must become operative on some date. The date named was when St. 1907, c. 563, became effective by which the tax was made applicable to direct as well as to collateral inheritances. The legislative intent possibly was to tax succession under St. 1907, c. 563, not as from the donee but from the donor of the power. Whatever the reason, the classification cannot be pronounced arbitrary or unreasonable. The tax operates equally and uniformly as to all within this class. It may fairly have been deemed by the General Court to be founded in the "purposes and policy of taxation." Watson v. State Comptroller, 254 U. S. 122, 125. Maxwell v. Bugbee, 250 U. S. 525, 543. Stebbins v. Riley, 268 U. S. 137, 142. Louisville Gas & Electric Co. v. Coleman, 277 U. S. 32, 37. Hayes v. Missouri, 120 U. S. 68, 71, 72. Colgate v. Harvey, — U. S. — (decided December 16, 1935). The decision in In re Estate of Pedersen, 198 Iowa, 166, 172, 173, precisely supports the conclusion here reached.

No argument has been made as to the calculation of the tax. What has been said disposes of the controversies as

presented. It follows that the petition for abatement must be denied.

Ordered accordingly.

C. M. Rogerson, for the petitioner .
C. F. Lovejoy, Assistant Attorney General, for the respondent.

Reporter's certificate to foregoing paper omitted in printing.

[fol. 42j] [File endorsement omitted.]

[fol. 43] In Probate Court of Norfolk County

No. 28100

Estate of Sarah E. Lawrence

Petition for Abatement of Massachusetts Succession Tax

Final Decree After Rescript—Filed January 20, 1936

At a Probate Court holden at Dedham in and for said County of Norfolk on the twentieth day of January in the year of our Lord, One Thousand Nine Hundred and Thirty-six.

Upon a reservation and report of said Court dated February 20, 1935, on petition for abatement of Massachusetts succession tax, and rescript thereon returned from the Supreme Judicial Court and being dated January 2, 1936,

It Is Decreed that said petition for abatement of Massachusetts Succession Tax, filed by Harriet C. Binney, et als., trustees under the Will of Sarah E. Lawrence, be and the same hereby is denied.

Joseph R. McCoole, Judge of Probate Court.

January 20, 1936.

[File endorsement omitted.]

[fol. 44] Withdrawal of appearance for petitioners, filed April 17, 1936, omitted in printing.

Appearance of counsel for petitioners, filed April 17, 1936, omitted in printing.

[fol. 45] IN PROBATE COURT OF NORFOLK COUNTY

[Title omitted]

Petition for Appeal, Assignment of Errors, and Prayer for Reversal—Filed April 17, 1936

Considering themselves aggrieved by the final decree entered in the above entitled cause (pursuant to the decision and rescript of the Supreme Judicial Court of the Commonwealth of Massachusetts) by the Probate Court for the County of Norfolk in said Commonwealth under the docket number 28100, the petitioners therein, Harriet C. Binney, Frederic Cunningham, Constance C. Pertzoff, Susannah C. Coolidge, Frederic Cunningham and George S. Parker as trustees under indenture of trust dated January 26, 1877, Frederic Cunningham as administrator of the estate of Hetty Sullivan, Lawrence Cunningham, and William Lawrence, John S. Lawrence, Leverett Saltonstall and Augustus Hemenway as they are trustees under the will of Sarah E. Lawrence, hereby pray that an appeal be allowed to the Supreme Court of the United States herein and that there be entered an order fixing the amount of the bond on such appeal.

Said petitioners assign the following errors in the record and proceedings herein:

1. Said Supreme Judicial Court erred in refusing to hold that section 1 of chapter 65 of the General Laws of Massa-
[fol. 46] chusetts (Ter. Ed.) (as constructed by said court) denies to the petitioners and to those claiming under them the equal protection of the laws contrary to the Fourteenth Amendment to the Constitution of the United States.

2. Said Supreme Judicial Court erred in refusing to hold that section 2 of chapter 65 of the General Laws of Massachusetts (Ter. Ed.) (as construed by said court) denies to the petitioners and to those claiming under them the equal protection of the laws contrary to the Fourteenth Amendment to the Constitution of the United States.

3. Said Supreme Judicial Court erred in refusing to hold that section 1 of chapter 65 of the General Laws of Massachusetts (Ter. Ed.) (as construed by said court) deprives the petitioners and those claiming under them of their property without due process of law contrary to the Fourteenth Amendment to the Constitution of the United States.

4. Said Supreme Judicial Court erred in refusing to hold that section 2 of chapter 65 of the General Laws of Massachusetts (Ter. Ed.) (as construed by said court) deprives the petitioners and those claiming under them of their property without due process of law contrary to the Fourteenth Amendment to the Constitution of the United States.

5. Said Supreme Judicial Court erred in holding that each of the taxes now in question, and the total of said taxes, were lawfully assessed and that the petitioners are not entitled to the abatement thereof.

6. Said Probate Court erred in denying the petitioners' prayer for abatement and in dismissing their petition.

7. Said Supreme Judicial Court erred in refusing to hold that sections 1 and 2 of chapter 65 of the General Laws of Massachusetts (Ter. Ed.) (as construed by said court and as applied to the facts revealed on the record in this cause) [fol. 47] deny to the petitioners and to those claiming under them the equal protection of the laws contrary to the Fourteenth Amendment to the Constitution of the United States because

(a) Said sections as construed purport, by virtue of provisions originally enacted in the year 1909, to impose an inheritance or succession tax upon the succession to property by the petitioners under the provisions of an inter vivos trust established in 1862 and the provisions of a testamentary trust established in 1891, solely because said property was subject to unexercised powers of appointment created prior to September 1, 1907, whereas if these powers had been created by exactly similar instruments effective subsequent to September 1, 1907, no succession tax would be imposed under said sections or otherwise on the succession to property under the inter vivos trust and the passing of property under the testamentary trust, if taxable at all, would be taxable at a different and lower rate than that of the assessment in fact made upon it.

(b) Said sections as construed purport, by virtue of provisions originally enacted in 1909, to authorize the adding together, for the purposes of levying a higher rate of tax under a schedule of graduated tax rates which increase as the sum taxed increases, of (i) property inherited by various of the petitioners under the terms of trusts established by two settlors, now deceased, in 1862 and in 1891, and (ii) property passing by intestacy and inherited by the petitioners from a third decedent who died in 1931, solely because this decedent was the donee of a general testamentary power of appointment under the 1862 trust and a special testamentary power of appointment under the 1891 trust, neither of which powers said decedent did in fact exercise; whereas if these powers of appointment had been created by instruments which had taken effect after September 1, 1907, the property to which the petitioners succeeded by the terms of one of these trusts would not be [fol. 48] taxed, and that property to which the petitioners succeeded by the terms of the other trust, if taxable at all, could only be taxed at one-quarter the rate which was in fact assessed upon it.

8. Said Supreme Judicial Court erred in refusing to hold that sections 1 and 2 of chapter 65 of the General Laws of Massachusetts (Ter. Ed.) (as construed by said court and as applied to the facts revealed on the record in this cause) deprive the petitioners and those claiming under them of their property without due process of law contrary to the Fourteenth Amendment to the Constitution because

(a) Said sections (as so construed and applied) purport to treat property passing to various of the petitioners in default of the exercise of the powers of appointment here involved as property of the donee of such powers, when in fact it was in no sense the property of the donee, in order to unite such property with the interests of the said petitioners (arising by intestacy) in the estate of the said donee and by so uniting it (i) to tax the property so passing in default of the exercise of one of such powers which would not be subject to tax if treated as the property of the donor of that power, and (ii) to tax the property passing in default of the exercise of the other power at a higher rate than would be permitted by said sections, if the said property had been taxed as passing to such petitioners from the donor of the power;

(b) Said sections (as construed and applied by said court) purport to tax, as property passing from the donee of the powers hereinafter mentioned, property to which various of the petitioners succeeded in default of the exercise of powers of appointment, created by persons other than the donee of such powers under an instrument of trust [fol. 49] executed and effective, and under the will of a person dying, prior to the enactment and the effective date of said sections;

(c) Said sections (as construed and applied by said court) purport to tax property passing to the petitioners in default of the exercise of powers of appointment, created under wills or instruments of trust effective prior to the enactment and the effective date of said sections, despite the fact that the interests taken by the petitioners were in no manner affected, and, in some instances could in no manner be substantially affected, by any act of the donee of the powers.

(d) Said sections (as construed and applied by said court) purport to tax the succession of various of the petitioners to property passing under the terms of an indenture of trust which neither contained nor reserved any power to revoke, alter or amend or any power of appointment and which was executed and effective prior to the enactment of the said sections, when the interests of the said petitioners in this property were before the said enactment fixed and determined beyond any possibility of change except by the birth of an additional member of a class of beneficiaries of which the said petitioners are members or by the death of a member or members of that class.

9. Said Supreme Judicial Court erred in failing to hold that section 1 and section 2 of chapter 65 of the General Laws of Massachusetts (Ter. Ed.) (as construed and applied by said court) are each repugnant to section 10 of Article I of the Constitution of the United States in that they severally impair the obligation of the contract embodied in each of the following documents:

(a) said trust indenture dated January 26, 1877,

[fol. 50] (b) an agreement dated July 24, 1862, whereby the Massachusetts Hospital Life Insurance Company

agreed in consideration of the receipt of a certain sum from Amos A. Lawrence to hold said sum upon certain trusts,

(c) the will of Sarah E. Lawrence who died in 1891.

For which errors said petitioners pray that the final decree of the Probate Court for the County of Norfolk in the Commonwealth of Massachusetts entered in the above entitled cause on January 20, 1936, (pursuant to the decision and rescript of the Supreme Judicial Court of said Commonwealth) be reversed and a decree entered in favor of said petitioners and for their costs.

Palmer, Dodge, Barstow, Wilkins & Davis, R. Ammi Cutter, Talcott M. Banks, Jr., Solicitors for Petitioners.

[fol. 50½] [File endorsement omitted.]

[flo. 51] In Probate Court of Norfolk County

[Title omitted]

Order Allowing Appeal—Filed April 17, 1936

The appellants in the above entitled cause, and each of them, having prayed for the allowance of an appeal in this cause to the Supreme Court of the United States from the decree made and entered in the above entitled cause by the Probate Court for the County of Norfolk in the Commonwealth of Massachusetts under docket No. 28,100 on the 20th day of January, 1936, and from each and every part thereof, and having presented and filed their petition for appeal, assignment of errors, prayer for reversal and statement as to jurisdiction on appeal, pursuant to the statutes and rules of the Supreme Court of the United States in such case made and provided;

It is now here ordered that an appeal be, and the same is hereby allowed to the Supreme Court of the United States from the Probate Court for the County of Norfolk and Commonwealth of Massachusetts in the above entitled cause, as provided by law, and it is further ordered that the register of probate for said County of Norfolk shall pre-
[fol. 52] pare and certify a transcript of the record, pro-

ceedings and decree in this cause and transmit the same to the Supreme Court of the United States, so that he shall have the same in said court within forty days of this date.

And it is further ordered that security for costs on appeal be fixed in the sum of two hundred dollars ($200).

Joseph R. McCoole, Judge of the Probate Court for the County of Norfolk in the Commonwealth of Massachusetts.

April 17, 1936.

[File endorsement omitted.]

[fols. 53 & 54] Bond on appeal for $200.00, approved and filed April 17, 1936, omitted in printing.

[fol. 55] Citation, in usual form, showing service on Henry F. Long, filed April 21, 1936, omitted in printing.

[fol. 56] In Supreme Court of the United States

[Title omitted]

Stipulation re Transcript of Record—Filed May 14, 1936

It is hereby agreed that the portions of the record hereinafter specified and no others be included in the transcript to be transmitted to the Supreme court of the United States in connection with the appeal of Harriet C. Binney and others from the decree entered by the Probate Court for the County of Norfolk in the Commonwealth of Massachusetts on January 20, 1936, denying the petition brought by them against Henry F. Long, Commissioner of Corporations and Taxation of said Commonwealth, for the abatement of certain taxes:

1. Petition in equity for abatement of succession tax (including copy of Trust Indenture of January 26, 1877, copy of will of Sarah E. Lawrence, and copy of codicil to will of Sarah E. Lawrence) filed September 20, 1933.

2. Appearance of Charles M. Rogerson, Esq., for petitioners.

3. Citation and return of service.

4. Appearance of Joseph E. Warner, Attorney General, for the Commissioner of Corporations and Taxation.

5. Agreed statement of facts (including Exhibit "A", Copy of Trust Indenture of January 26, 1877, and Exhibit "C", Copy of Agreement for Annuity in Trust dated July 24, 1862).

[fol. 57] 6. Amendment to Agreed Statement of Facts (allowed February 20, 1935).

7. Reservation and Report.

8. Rescript.

9. Opinion of Supreme Judicial Court.

10. Final decree after rescript (entered January 20, 1936).

11. Withdrawal of the appearance of Charles M. Rogerson, Esq., for petitioners.

12. Appearance of R. Ammi Cutter and Talcott M. Banks, Jr., for petitioners.

13. Petition for appeal, assignment of errors and prayer for reversal.

14. Statement as to jurisdiction upon appeal.

15. Order allowing appeal (entered April 17, 1936).

16. Bond on appeal.

17. Citation (with return of service).

18. Statement of service upon the Commissioner of Corporations and Taxation of a copy of the petition for and order allowing the appeal, a copy of the assignment of errors and of the statement as to jurisdiction upon appeal, and a statement directing attention to the provisions of Paragraph 3 of Rule 12 of the Supreme Court of the United States (with acceptance of service).

It is further agreed

1. That Items 2, 3, 4, 11, 12, 16, 17 and 18 need not be printed, and

2. That Exhibit "A" (copy of Trust Indenture dated January 26, 1877) annexed to the Agreed Statement of Facts, Item 5, supra, need not be printed inasmuch as this exhibit is annexed also to the Petition in Equity for Abatement of Succession Tax (Item 1, supra), and will be printed as so annexed and as so printed may be referred to at the

end of the Agreed Statement of Facts (Item 5, supra) as printed.

R. Ammi Cutter, Talcott M. Banks, Jr., Solicitors for Appellants. Paul A. Dever, Attorney General, by James J. Ronan, Assistant Attorney General.

[File endorsement omitted.]

[fol. 58] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION TO PRINT ENTIRE RECORD—Filed May 23, 1936

The appellants adopt their assignment of errors as their statement of the points to be relied upon and represent that the whole of the record as filed, other than the bond on appeal and the appearances of counsel, is necessary for the consideration of the case.

R. Ammi Cutter, Talcott M. Banks, Jr., Solicitors for Appellants.

Boston, Massachusetts, May 12, 1936.

Due and sufficient service of the foregoing statement and designation is hereby acknowledged.

Paul A. Dever, Attorney General of Massachusetts, by James J. Ronan, Assistant Attorney General.

[fol. 59] [File endorsement omitted.]

Endorsed on cover: File No. 40,613. Massachusetts Probate Court, County of Norfolk. Term No. 77. Harriet C. Binney, Frederic Cunningham, and Constance C. Pertzoff, et al., appellants, vs. Henry F. Long, Commissioner of Corporations and Taxation of the Commonwealth of Massachusetts. Filed May 23, 1936. Term No. 77, O. T., 1936.